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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 132

DUFFY STORAGE AND MOVING CO.; JAMES A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,
Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as The City Council of The City and County of Denver, and Robert B. Keating, John F. Kelly, Irving S. Hook, Paul A. Hentzell, Kenneth A. MacIntosh, Carl W. DeTemple, Edward F. Burke, Jr., Elvin R. Caldwell, Ernest P. Marranzino, as the members of and being and constituting the Board of Councilmen of the City and County of Denver, sometimes also known and referred to as the City Council of the City and County of Denver, and CHARLES L. TEMPLE, as Manager of Revenue of the City and County of Denver,
Appellees.

MOTION TO DISMISS AND APPENDICES

MAX P. ZALL,
City Attorney
W. KEITH PETERSON,
Assistant City Attorney
EARL T. THRASHER,
Assistant City Attorney

353 City and County Building
Denver, Colorado 80202
297-2661

Attorneys for Appellees

EASTWOOD PRINTING CO. • 2854 LARIMER STREET • DENVER, COLORADO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1411

DUFFY STORAGE AND MOVING CO.; JAMES A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as The City Council of The City and County of Denver, and Robert B. Keating, John F. Kelly, Irving S. Hook, Paul A. Hentzell, Kenneth A. MacIntosh, Carl W. DeTemple, Edward F. Burke, Jr., Elvin R. Caldwell, Ernest P. Marranzino, as the members of and being and constituting the Board of Councilmen of the City and County of Denver, sometimes also known and referred to as the City Council of the City and County of Denver, and CHARLES L. TEMPLE, as Manager of Revenue of the City and County of Denver,

Appellees.

MOTION TO DISMISS AND APPENDICES

Come now the Appellees above-named, by their Counsel, and under and pursuant to Rule 16 of the Rules of the Supreme Court move this Honorable Court to dismiss this purported appeal of the Appellants from the final judgment (Appellees' Appendix 1, p. 10 of the Supreme Court of the State of Colorado, dated February 17, 1969, upon the grounds that (a) such appeal does not present a substantial federal question; (b) that the federal questions sought to be reviewed were not properly raised, or expressly passed on; and, (c) that the judgment of the

Colorado Supreme Court rests on an adequate non-federal basis, all as more particularly hereinafter set forth.

Appellees' Factual Statement

We find that while the Appellants' "FACT STATEMENT AND STATUTES INVOLVED," as set forth on pages 3 through 11 of Appellants' Jurisdictional Statement herein, does contain many uncontrovertible statements, yet the editorializing by the writer has, in our opinion, presented the matter improperly. For such reasons, we shall inform the Court in our own language the facts before the Colorado Court in this action as they pertain to the issues before the Court. We have added as Appendices herto, viz., the final judgment of the Colorado Supreme Court herein dated February 17, 1969 as Appendix 1, p. 10 and the final judgment herein dated December 20, 1968 of the District Court of the City and County of Denver as Appendix 2.

The Appellants challenged the legality of three taxing ordinances of the City and County of Denver in the District Court of the City and County of Denver. The alleged existence of a question of constitutional infirmity on the federal level of said taxes was eliminated from the cause by the execution of the Stipulation (Appellants' Jurisdictional Appendix F). That document by paragraph 2.1 thereof (p. 112, Appellants' Jurisdictional Statement), limited for all purposes said cause to "questions of power, jurisdiction and authority to pass and enforce the several ordinances and the taxes and impositions asserted to be made by them." Likewise said document became by the terms of paragraph 9 thereof (p. 115, Appellants' Jurisdictional Statement) an agreed statement of fact, as set forth by paragraph 1, in subparagraphs 1 through 8

thereof (pp. 110-112, Appellants' Jurisdictional Statement).

We wish to point out that the only factual matters before the State Courts, the adoption of the subject ordinances being admitted, related to the fact (a) that the named corporate plaintiffs were engaged in business within the City and County of Denver to some considerable extent, and in so doing employed both residents and non-residents of the City and County of Denver to perform services for the corporation therein, and (b) that the individual plaintiffs performed services within Denver for said corporate plaintiffs in a managerial capacity and that of master and servant. It is also admitted that one or more of said corporate plaintiffs were engaged in both interstate and intrastate commerce. It is also true that these parties for the purpose of the suit, were considered to be proper parties to maintain the action as a class action (paragraph 2, p. 112, Appellants' Jurisdictional Statement). The Stipulation further limited the plaintiffs capacity by the statement contained in paragraph 2.1 (p. 112, Appellants' Jurisdictional Statement) — "Plaintiffs in their said representative capacity do not act with relation to any special circumstances or matters as they may affect particular individuals."

It was in this posture that the District Court made its findings and judgment (Appellees' Appendix 2, p. 12). The District Court found as to said stipulation the following:

> "1. That the Plaintiffs are proper parties to bring and maintain this action individually and as representative of and for all others similarly situated for the determination of the power, jurisdiction and

authority of the Defendants to pass and enforce the aforesaid ordinances.

* * * *

"3. That the questions presented in this action are entirely questions of law as to the validity of said ordinances and that no disputed questions of fact are involved.

"4. That there are no questions presented as to the procedural adoption of said ordinances but that the questions presented relate to the substantive validity of said ordinances and the jurisdiction to adopt or to enforce the same."

The District Court then entered its final judgment therein (a) that Ordinance No. 234, denominated as an Earnings Tax, was beyond the power of the City and County of Denver to adopt and enforce because of Sec. 17 of Article X of the Colorado Constitution, and permanently enjoining its enforcement (Appellees Appendix 2, pp. 13, 14); (b) that Ordinances Nos. 232 and 233 (Appellees' Appendix 2, pp. 13, 14) and amendments thereto, "are valid, constitutional and enforceable." In its findings as to Ordinances Nos. 232 and 233 and amendments thereto, the District Court specially relied upon four Colorado cases to support its determination — *Post v. City of Grand Junction*, 118 Colo. 434, 195 P. 2d 958; *Jackson v. City of Glenwood Springs*, 122 Colo. 323, 221 P. 2d 1083; *Ping v. City of Cortez*, 139 Colo. 575, 342 P. 2d 657; and *City of Englewood v. Wright*, 147 Colo. 537, 364 P. 2d 569 (Appellees' Appendix 2, p. 13).

Both parties sued out Writs of Error from the District Court to the Supreme Court of the State of Colorado. The latter Court in the majority opinion by Mr. Justice

Day (Appellants' Appendix A-1, p. 10) by reason of the aforesaid stipulation (Appellants' Appendix F) limited its determinations by this language:

> (p. 42) "We state at the outset that what is not involved or intended to be covered in this decision is the rights, exemptions and immunities of the individual employers and employees as they may believe their respective positions to be under the definitions and the terms of the ordinances .... We further add that with reference to the myriad administrative questions which may arise as to the named plaintiffs in their individual capacities, or as to other individuals similarly situated relating to their special circumstances under the ordinances held to be valid, there is provided in these ordinances administrative procedures which must be exhausted before review may be had in the Courts.
>
> "Also we further state that *what we do hold herein* is limited as provided in the stipulation to the question of power, jurisdiction and authority (of Denver) to pas and enforce the several ordinances and the taxes and impositions asserted to be made by them."

The Colorado Supreme Court then affirmed the judgment of the District Court holding Ordinance No. 234 (Earnings Tax) invalid by virtue of the prohibitions contained in Sec. 17 of Article X of the Colorado Constitution. This ruling has been accepted by Denver and the power of Denver to impose such a tax is now moot. With respect to the remaining ordinances, the Colorado Supreme Court, likewise, affirmed the District Court judgment with respect to Ordinances Nos. 232 and 233. It determined the

validity of Ordinance No. 232 specifically on the basis of Colorado law previously amended by it in the cases of *Post v. Grand Junction*, supra; *Jackson v. Glenwood*, supra; *Ping v. Cortez*, supra; and *Englewood v. Wright*, supra, on the basis of the "doctrine of stare decisis on which municipalities have extensively relied in the imposition of similar taxes, dictates that the four cited cases have settled the law and set at rest constitutional questions raised thereon."

The Colorado Supreme Court with respect to Ordinance No. 233, determined that the tax imposed thereby was not "a flat tax on income", but was valid and "limited to an employee engaged in an occupation, i.e., one who is performing such service for an employer, as defined, within Denver for any period of time in a calendar month upon a salary, wage, commission or other compensation basis". The Court then went on to hold that the four cases previously cited as upholding the validity of Ordinance No. 232, control Ordinance No. 233. The exemption of those earning less than $250 per month was held to be a reasonable classification, approved in cited Colorado cases, as a "concrete way of exempting those who perform only minimal services within Denver". The question raised as to the withholding portion of Ordinance No. 233 was held valid on the stated grounds, "that there is no constitutional prohibition against such imposition upon employers who must withhold state and federal income taxes. This should be answer in itself to this argument."

The tax imposed by Ordinance No. 232, denominated Business Occupational Privilege Tax (Appellants' Appendix C) can best be described by the legislative intent set forth in Section 2-1 thereof (pp. 76 and 77, Jurisdictional Statement), viz:

"2-1 The Council of the City and County of Denver finds, determines and declares that considering the business and occupations in the City and County of Denver, and the relations of such business and occupations to the municipal welfare, as well as the relation thereof to the expenditures required by the City and County proper, just and equitable distribution of the tax burdens within the City and all matters proper to be considered in relation thereto, and that the tax imposed on each business herein defined is reasonable, proper, uniform and non-discriminatory and necessary for a just and proper distribution of tax burdens within the City and County of Denver."

The tax was imposed by Section 3-1 (p. 77, Jurisdictional Statement) upon a business with a fixed or transitory situs within Denver on the basis of $2.00 per month for the first owner, partner, manager or employee and the additional sum of $2.00 per month for each additional owner, partner, manager or employee who performs within Denver for any period of time in a calendar month any services or other activities in the operation of such business within Denver. Thereby, the tax was related solely to local activities of the businesses so taxed as performed within Denver by their managers and employees. This becomes doubly clear when Section 4-1 thereof (p. 79, Jurisdictional Statement, is examined, viz:

"4-1 Nothing contained in this article shall be construed to empower Denver to levy and collect the tax imposed upon any person engaged in business within Denver under the Constitution of the United States and the Constitution of the State of Colorado."

The tax imposed by Ordinance No. 233 denominated

Employee Occupational Privilege Tax (Appellants Appendix D) can likewise best be described by legislative intent, set forth in Section 2 thereof (p. 83, Jurisdictional Statement), viz:

> "2 Legislative Intent.
>
> "2-1 The Council of the City and County of Denver determines and declares that the performance of services within Denver by an employee for an employer as herein defined, for any period of time in a calendar month for wages as herein defined, is the exercise of a taxable privilege, whether or not all or only part of the services of such natural person are performed within Denver.
>
> "2-2 The Council of the City and County of Denver further determines and declares that considering the relationship existing between the exercise by employees of the taxable privilege set forth in subsection 2-1 hereof, and the expenditures required by Denver for street maintenance, police and fire protection and other municipal services and to provide for the general welfare, and the relationship of the exercise of said taxable privilege of employees to a proper, just and equitable distribution of the tax burdens within Denver and all matters considered in relation thereto, that the tax herein imposed on employees is reasonable, proper, uniform, non-discriminatory and necessary for a just and proper distribution of the tax burdens within Denver."

The tax was imposed by Section 3-1 (pp. 83 and 84, Jurisdictional Statement) upon an employee who performs services within Denver for any period of time in a calendar month for an employer at the rate of $2.00 for each

and every month in which he is so employed. An employee by Section 1-2 (p. 82, Jurisdictional Statement) was defined as one who receives as compensation no less than $250.00 per calendar month. This Ordinance, like Ordinance No. 232, provides in Section 5 (pp. 86 and 87, Jurisdictional Statement) that:

> "Nothing in this article shall be construed to empower Denver to levy and collect the tax hereby imposed upon any taxpayer not within the taxing power of Denver, under the Constitution of the United States and the Constitution laws of the State of Colorado."

Argument and Conclusion

As shown by the above factual statement, no substantial federal questions exist in the record with reference to Ordinances Nos. 232 and 233. In fact, it is our opinion that the facts reveal that no federal questions were presented properly or improperly in this cause in the Colorado Courts.

This Honorable Court has repeatedly sustained state and local taxes, such as the taxes imposed here by Denver, against claims of violation of the Due Process Clause of the Fourteenth Amendment, and claims of creation of an unconstitutional burden upon interstate commerce, if the taxing authority "has given anything for which it can ask return", or "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444; *Freeman v. Hewitt*, 329 U.S. 249, 253; *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663; *Northwestern States Portland Cement v. State of*

Minnesota, 358 U.S. 450, 462; *Standard Oil Co. v. Peck*, 342 U.S. 382; *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169; *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340; *Scripto, Inc. v. Carson*, 362 U.S. 207; and *American Oil Co. v. Neill*, 380 U.S. 451.

In these ordinances we have the presence within Denver and the performance of services of the businesses and employees taxed, which is the required minimum connection or link; and the furnishing of the services set forth in the legislative intent sections of the ordinances for which Denver can by said taxes ask return.

In view of the decisions aforesaid, there cannot be found in the record before the Colorado Courts any question under the Due Process or Commerce Clauses as to the invalidity of the Ordinances Nos. 232 and 233 sufficiently substantial to support the appeal herein.

The Jurisdictional Statement also contains averments as to violation of the Equal Protection Clause of the Fourteenth Amendment based upon discrimination resulting from the exemption of those earning less than $250.00 per month. This Honorable Court has repeatedly held that "Equal protection does not require identity of treatment. It only requires that classification rests on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification as to be wholly arbitrary". *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 244; and that a state or local government "in its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same* class equality of rights. *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 121;

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522; *Aero Mayflower Transit Co. v. Board of R.R. Com'rs. of State of Montana*, 332 U.S. 495; *Skinner v. State of Oklahoma, ex rel. Williamson*, 316 U.S. 535; *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117; *Clark v. Paul Gray, Inc.*, 306 U.S. 583; *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573; *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412; and *Dominion Hotel, Inc. v State of Arizona*, 249 U.S. 265.

The classification imposed under Ordinance 233 is clearly valid under the foregoing decisions. For the reasons aforesaid, we assert that the appeal herein does not present a substantial federal question on the issue of violation of the Equal Protection Clause.

It is our opinion also that the judgment of the Colorado Courts rests on adequate state constitutional grounds, as is apparent from the majority opinion of Mr. Justice Day (Appellants' Appendix A-1).

Respectfully submitted,

MAX P. ZALL,
City Attorney

W. KEITH PETERSON,
Assistant City Attorney

EARL T. THRASHER,
Assistant City Attorney

353 City and County Building
Denver, Colorado 80202
297-2661

Attorneys for Appellees

Appendix 1.

STATE OF COLORADO, ss.

In the Supreme Court Thereof.

TO THE PEOPLE OF THE STATE OF COLORADO,
To the District Court of the City and County of Denver and State of Colorado,

Greeting:

WHEREAS, lately in the District Court of the City and County of Denver, State aforesaid, in a certain cause therein pending between DUFFY STORAGE AND MOVING CO., ET AL., *Plaintiffs* and THE CITY & COUNTY OF DENVER, ET AL., *Defendants*,

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, by writ of error to said District Court.

AND WHEREAS, at the January Term of our Supreme Court, in the year of our Lord one thousand nine hundred and sixty-nine, the said cause came on to be heard before our said SUPREME COURT on the 5th day of February, A. D. 1969 (the same being one of the Judicial days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

---

*The City and County of Denver, etc. et al., vs. Duffy Storage and Moving Co., et. al.,

No. 23940 & 23941 vs.

*Duffy Storage and Moving Co., et al., vs. The City and County of Denver etc. et al.,

(*Captions abbreviated)

Error to the District Court of the
City and County of Denver (C-08472)

This cause having been brought to this Court by writ of error to review the judgment of District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be and the same is hereby affirmed, and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid that such further proceedings may be had in said cause as shall conform to the judgment of this Court entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE ROBERT H. MCWILLIAMS, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 17th day of February A.D. 1969.

RICHARD D. TURELLI,
Clerk Supreme Court. By *Florence Walsh*, Deputy.

Appendix 2.

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C-8472. Div. 8.

DUFFY STORAGE AND MOVING CO.; James A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; and RIDGE EREC-TION CO., *Plaintiffs,*

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH A. MacINTOSH, CARL N. DeTEMPLE, EDWARD F. FURKE, JR., ELVIN R. CALDWELL, ERNEST P. MARRAZINO, as the members of and being and constituting THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER; and CHARLES L. TEMPLE, as Manager of Revenue of THE CITY AND COUNTY OF DENVER,

Defendants.

THIS MATTER came on for trial on December 18,

1968, Plaintiffs appearing by counsel, George Louis Creamer, and Defendants appearing by City Attorney, Max P. Zall, and Assistant City Attorney, W. Keith Peterson.

On said day the Court heard the statements and arguments of counsel and continued the matter to December 19, 1968 for further argument at the termination of which the Court took the matter under advisement.

The Court having considered the statements and arguments of counsel and now being fully advised in the premises,

FINDS:

That this is an action for declaratory judgment as to the validity of Ordiances Number 232, 233 and 234, Series of 1968, of the City and County of Denver and the amendments thereto.

That it is stipulated by and between the parties hereto as follows:

1. That the Plaintiffs are proper parties to bring and maintain this action individually and as representative of and for all others similarly situated for the determination of the power, jurisdiction and authority of the Defendants to pass and enforce the aforesaid Ordinances,

2. That Plaintiffs' Exhibits A, B and C and Defendants' Exhibits 1 and 2 may be received in evidence as the texts of the subject Ordinances and amendments thereto,

3. That the questions presented in this action are entirely questions of law as to the validity of said ordinances and that no disputed questions of fact are involved, and

4. That there are no questions presented as to the procedural adoption of said ordinances but that the questions presented relate to the substantive validity of said ordinances and the jurisdiction to adopt or to enforce the same.

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and the amendments thereto involve the imposition of a "Business Occupational Privilege Tax" and an "Occupational Tax Upon Employees, both of which are to be effective on and after 11:59 P.M., December 31, 1968, while Ordinance Number 234, Series of 1968, of the City and County of Denver involves the imposition of an "Earnings Tax For General Revenue Purposes," to be effective on and after March 31, 1969.

That the City and County of Denver has authority and power to impose occupational taxes under Article XX of the Constitution of Colorado.

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver, as amended, impose valid occupational taxes under *Post, et al vs. City of Grand Punction,* 118 Colo. 434, 195 P. 2d 958; *Jackson, et al vs. City of Glenwood Springs,* 122 Colo. 323, 221 P. 2d 1083; *Ping vs. City of Cortez, etc.,* 139 Colo. 575, 342 P. 2d 657 and *City of Englewood, et al vs. Wright, et al,* 147 Colo. 537, 364 P. 2d 569.

That the Supreme Court of the State of Colorado

held in *Denver, et al vs. Sweet, et al,* 138 Colo. 41, 329 P. 2d 441, that the City and County of Denver does not have the authority and power to impose an income tax.

That the Defendants have not seriously contended that the tax to be imposed by Ordinance Number 234, Series of 1968, of the City and County of Denver is not an income tax and the same is found to be an income tax by this Court.

That said Ordinance is, therefore, in violation of Article X, Section 17 of the Constitution of Colorado under the holding of *Denver, et al vs. Sweet, et al,* supra, and, as such, the same is unenforceable.

That the Plaintiffs have requested injunctive relief restraining the Defendants from enforcing said Ordinance Number 234.

That, the said Ordinance Number 234 being invalid, the entry of a permanent injunction, as to the enforcing of the same, is justified.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, as follows:

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and amendments thereto are valid, constitutional and enforceable and Plaintiffs' Complaint as to said Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and amendments thereto should be and hereby is dismissed.

That Ordinance Number 234, Series of 1968, of the City and County of Denver is in violation of Article X, Section 17 of the Constitution of Colorado and judgment

should be and hereby is entered declaring the same to be null and void and of no effect.

That the Defendants and each of them should be and hereby are enjoined from directly or indirectly, through their agents, servants, officers or employees, attempting to enforce the provisions of Ordinance Number 234, Series of 1968, of the City and County of Denver or endeavoring to collect any tax, imposition of levy thereunder.

DONE IN CHAMBERS this 20th day of December, 1968.

BY THE COURT:

E. J. KEATING
Judge